IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL NO. 1037 OF 1999
With
CRIMINAL APPEAL NO. 1092 OF 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE R.H.SHUKLA

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge ?

==========

BHAVSINHBHAI HAMSINHBHAI MAKWANA - Appellant(s)
Versus
STATE OF GUJARAT & ANR. - Respondent(s)

==========

Appearance :
Criminal Appeal No.1037 of 1999
Mr. M.J. Buddhbhatti with Ms. K.D. Parmar for Appellant(s) : 1 - 2.
Mr. R.C. Kodekar, APP for Respondent(s).

Criminal Appeal No.1092 of 1999
Mr. R.C. Kodekar, APP for Appellant (s).
Mr. M.J. Buddhbhatti with Ms. K.D. Parmar for Respondent(s).

==========

CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA
and
HONOURABLE MR.JUSTICE R.H.SHUKLA

Date : 07 /12/2007

COMMON ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in these two criminal appeals is to the correctness of the judgment and order dated 12th August, 1999 rendered in Sessions Case No. 12 of 1996 by the learned Additional Sessions Judge, Amreli, by which the appellants ("A1 and A3" for short) of Criminal Appeal No.1037 of 1999 have been convicted for commission of the offences punishable under Sections 302 and 114 of the Indian Penal Code ('IPC' for short) and sentenced to suffer imprisonment for life, whereas the respondent-accused ("A2" for short) in Criminal Appeal No.1092 of 1999 has been acquitted for the offences under Sections 302 and 114 of the IPC by awarding him benefit of doubt.

2. The prosecution case, as disclosed from the complaint and unfolded during the trial, is as under:

2.1 On the day of the incident, i.e. on 31st January, 1995 at 6:00 p.m., the victim-complainant, Gambhirsingh Keshubhai Makwana, along with his companion, had gone in his tractor to his thrashing place after filling ears of millet. A1, son of his elder father, had also put ears of millet in his thrashing place. He, therefore, told A1 to carry away his ears

as he had also to place his ears in the thrashing place. Therefore, a quarrel had started. Meanwhile, A2 and A3 came there and A1 and A2 caught him hold and A3 gave three blows with the knife on the right side of his chest and therefore, the victim sustained grievous injuries with profuse bleeding. His companion and other labourers interfered and got him released and his brother, Pratapbhai, had come to *Vadi* and brought him to Ghantvad in a tractor and thereafter, took him to Kantala by a *Chhakda* rickshaw and brought him to the hospital at Veraval in a motor.

2.2 As per the say of the victim, the accused had an intention to kill him and the reason for the said incident is that A1 had placed his ears of millet in his thrashing place and as he had to place his ears of millets, he had told him to take away those ears and therefore, a quarrel had taken place. The victim, therefore, lodged the complaint for the aforesaid incident in the hospital.

2.3 On the basis of the complaint, the offence came to be registered at C.R. No. 139 of 1995 with Kodinar Police Station and on registration of the complaint, the investigation was put into motion. During the course of investigation, the Executive Magistrate was summoned for the purpose of recording the dyeing declaration of the victim. During the course of treatment, the victim died on 1st November, 1999 in the hospital. Therefore, offence under Sections 302 and 114 of

IPC came to be registered against the accused. The Investigating Officer, thereafter, held the inquest of the dead body and thereafter, sent the dead body for autopsy report, a *panchnama* of the scene of offence was prepared and thereafter, the muddamal, which was recovered, was sent to the Forensic Science Laboratory ("FSL" for short) for chemical analysis. Thereafter, all the three accused came to be arrested.

2.2 On completion of the investigation, as sufficient incriminating evidence was found against all the accused, the Investigating Officer filed charge-sheet in the Court of the learned Judicial Magistrate (First Class), Kodinar for commission of the offences under Sections 302 and 114 of IPC. As the offence punishable under Section 302 of IPC was exclusively triable by the Court of Sessions, the learned Judicial Magistrate (First Class) committed the case to the Sessions Court, Amreli.

2.3 The learned Additional Sessions Judge, Amreli, before whom the case was made over for trial, framed the charge against the accused for commission of offences punishable under Sections 302 and 114 of IPC. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried. Therefore, they were put to trial by the learned Additional Sessions Judge, Amreli in Sessions Case No.12 of 1996.

2.4 In order to bring home the charge levelled against the accused, the prosecution has examined as many as 17 witnesses and relied upon their oral testimonies. The details of which are detailed in paragraph-5 of the impugned judgment and order, which are as under:

PW	Name	Status	Exh. No.
1	Bhimabhai Karsanbhai Mori	Witness	15
2	Bhavbhai Jivabhai Mori	Witness	26
3	Pratapbhai Gigubhai	Witness	27
4	Khatubhai Arjanbhai Makwana	Witness	33
5	Radhuben Rukhadbhai	Witness	34
6	Pranshanker Mohanlal Joshi	Panch Witness	37
7	Valibhai Ismailbhai Ghanchi	Panch Witness	40
8	Bhimbhai Hamirbhai Solanki	Panch Witness	42
9	Dewani Kishorekumar Vithhaldas	Dy. Mamlatdar, Veraval.	45
10	Dr. Kishorekumar Raghuvirdas Hariyani	Medical Officer, Municipal Hospital, Veraval.	50
11	Dr. Kumudchandra A. Fichadiya	Private Surgeon, Veraval.	63
12	Rajendrakumar Laxmishanker Pandya	Police Head Constable, Kodinar Police Station	69

PW	Name	Status	Exh. No.
13	Bhagwanjibhai Parshottambhai Madhak	Police Jamadar, Veraval Police Station.	74
14	Laxmanbhai Mahadevbhai Patel	Police Jamadar, Veraval Police Station.	79
15	Ibrahimbhai Jamalbhai	Police Jamadar, Ghantwad Out Post	82
16	Shashikant Chandubhai Dave	PSI, Jafrabad Police Station	85
17	Hakumatsingh Surubha Jhala	PSI, Kodinar Police Station.	90

2.5 To prove the culpability of the accused, the prosecution has also produced in all 24 documents and relied upon the contents of the same, the details of which are mentioned in paragraph-6 of the impugned judgment and order. They are as under:

Sr. No.	Particulars	Exh. No
1	Inquest Panchnama with inquest form.	17
2	Receipt handing over delivery of dead body of the deceased Gambhirsinh Keshubhai.	18
3	Certificate issued by the Medical Officer, Kodinar in respect of the blood group of the accused.	19

Sr. No.	Particulars	Exh. No
4	Receipt regarding the muddamal received by the chemical analyser for examination, with the copy of muddamal.	20
5	Analysis report of the Chemical Analyser.	21
6	Analysis report of Physics Division along with forwarding letter.	22
7	Map of the scene of offence prepared by the Circle Inspector.	23
8	*Yadi* sent by PSI, Kodinar to the T.D.O.-Kodinar for preparing the map of the scene of offence.	24
9	Panchnama of seizure of blood stained clothes of the deceased.	38
10	Panchnama of the scene of offence.	41
11	Arrest panchnama of the accused.	43
12	Discovery Panchnama of the accused – Dansingh Bhavsingh discovering the muddamal-knife.	44
13	*Yadi* written by the City Police, Veraval to the Mamlatdar, Veraval on 31/10/1995 for recording the dying declaration.	46
14	Dying declaration of the deceased Gambhirsinh Keshubhai.	47
15	Injury Certificate of the deceased Gambhirsinh Keshubhai issued by the Medical Officer, Municipal General Hospital, Veraval.	51
16	P.M. Note of the deceased Gambhirsinh Keshubhai.	53

Sr. No.	Particulars	Exh. No
17	Letter written by the Medical Officer, General Hospital, Veraval to Dr. Fichadiya.	55
18	Copy of the inquest panchnama.	56
19	Case paper of the deceased Gambhirsinh Keshubhai issued by Veraval General Hospital.	57
20	Certificate issued by Dr. Fichadiya regarding the injuries sustained by the deceased Gambhirsingh Keshubhai.	64
21	*Yadi* written by the P.S.O., Kodinar Police Station to Police Head Constable, Ibrahimbhai Jamalbhai for carrying out investigation.	70
22	*Yadi* written by the P.S.O., Veraval to the Head Constable on duty at the hospital, L.M. Patel.	75
23	*Yadi* written by PSO, Veraval Police Station to the Executive Magistrate, Veraval for drawing the inquest.	76
24	*Yadi* written by the P.S.O., Veraval to the Head Constable on duty at the hospital, L.M. Patel.	77

2.6 After recording of the evidence of the witnesses was over, the trial court explained to the accused the circumstances appearing against them and recorded their further statement under Section 313 of the Code of Criminal Procedure (“the Code” for short). In their further statements, they denied the case of the prosecution in its entirety and stated that false case has been filed against them. However, they neither produced any evidence nor did they examine any witness in support of

their defence.

2.7 On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court has come to the conclusion that the prosecution has established that the deceased died homicidal death. It is further held that on the basis of the oral evidence of the witnesses, the prosecution has established that A1 and A2 caught hold the deceased and A3 gave three blows on the chest of the deceased. However, in view of the dying declaration recorded by the Executive Magistrate wherein, *inter alia*, the deceased has stated that A1 caught hold him and A3 inflicted three blows and since the deceased did not mention the name of A2, the trial Court acquitted A2 by giving the benefit of doubt. However, according to the trial Court, the complicity of A1 and A3 has been established for committing murder of the deceased under Section 302 of IPC. The trial Court, therefore, convicted A1 and A3 for commission of the offences under Sections 302 and 114 of IPC and sentenced both of them to imprisonment for life.

2.8 Being aggrieved by the judgement and order of conviction and sentence recorded against A1 and A3, both of them have filed Criminal Appeal No.1037 of 1999 with the aid of Section 374 of the Code whereas the appellant-State being aggrieved by the judgement and order of acquittal recorded in favour of A2, has filed Criminal Appeal No.

1092 of 1999 with the aid of Section 378 of the Code.

3. Mr. M. J. Buddhbhatti, learned Advocate, with Ms. K. D. Parmar, learned Advocate of the appellants, has vehemently assailed the impugned judgment and order contending that there was a sudden quarrel and the incident occurred due to petty exchange of words; there was no previous enmity or quarrel between the assailants and the victim; the deceased was the cousin brother of A1 and they had cordial relations before the incident. It is further submitted by him that the deceased had come near the field of the accused; the field of the deceased was at a distance of 1000 ft.; he had come in tractor and trailor and asked accused to remove his millet crop as he wanted to thresh his millet crop. The accused were not armed with the weapon and only A3 took out the knife and as per the medical evidence, inflicted two blows, whereas PW2, Bhavbhai has, in his oral testimony, stated that A3 had inflicted three blows. According to him, the allegations of caught hold by A1 and A2 is doubtful *qua* A2 as the alleged dying declaration of the deceased is silent. Therefore, doubt arises as to the role of A1, who is similarly charged. He also emphasised that the evidence of the sole eye witness is not free from doubt for the following reasons:

(a) His clothes do not get stained even though he lifted the deceased at three places where the deceased was profusely bleeding near abdomen and it is natural to get blood stains

on the clothes of the lifter.

(b) No blood was found at the alleged scene of offence, nor scene of offence was shown by the witness.

(c) He does not inform to any one nor informs the police on the way though there were chowkies on the way.

(d) His statement was recorded at least after 24 hours of occurrence.

(e) He has made material improvements to fit in with the medical evidence.

(f) He has introduced new story of tractor tried to run over the deceased by Dilipsinh.

(g) He was employer of the deceased and was working as his labourer.

Therefore, according to him, the evidence cannot be accepted. It is too risky to rely upon such witness.

3.1 It is also asserted that the prosecution has introduced oral dying declaration through the relative witness, which is very weak piece of evidence. It is highly unnatural that the deceased/injured could have narrated the incident on the way to the hospital when he was in serious condition. It is also pointed out that the prosecution has placed reliance upon written dying declaration recorded by PW9 - Executive Magistrate.

The same was recorded when the injured was in serious condition and there are several discrepancies in the narration contrary to the evidence on record. The mental fitness of the deceased was seriously questioned by the defence. Therefore, the same cannot be accepted. It is also asserted by him that the trial Court has given the benefit of doubt to A2 by relying upon this piece of evidence. Therefore, he submitted that no reliance can be placed on the dying declaration, which is on record at Exh.47.

3.2 According to him, the prosecution has failed to examine independent witnesses and have examined only interested witnesses. The investigation was not prompt and their failure to collect blood from rickshaw, tractor, quilt and car and also clothes of the alleged eye witness along with late recording of the FIR goes to show that there was an attempt to give shape and colour to the prosecution story. The prosecution has tried to fill up lacuna at every stage and witnesses have made deliberate improvement in the prosecution story. He also submitted that the medical evidence on record, is shaky as to the nature of injuries and number of injuries. As per the opinion of the doctor, the deceased could have survived if he was given treatment in time. Therefore, according to him, the impugned judgement and order of conviction convicting A1 and A2 deserves to be quashed and set aside by allowing this appeal and thereby, acquitting both the accused of the

offence with which they are charged. Alternatively, it is submitted that so far as the role of A1 is concerned, he only caught hold the deceased and he had no intention to commit murder of the deceased and therefore, he can be at the best convicted for the offence under Section 304, Part-I of IPC. Similarly, it is also submitted that A3, who is alleged to have inflicted two knife blows to the deceased, had no intention to kill the deceased and therefore, he can also at the most be convicted for the offence under Section 304, Part-I of IPC. He lastly submitted that the accused are in jail for more than eight years and therefore, custodial sentence may be treated as substantive sentence for the offence under Section 304, Part-I of IPC. He, therefore, urged that the judgement and order of conviction and sentence, which is impugned in this appeal, may be modified by altering the conviction and sentence under Section 304, Part-I of IPC and custodial sentence may be treated as substantive sentence. He, therefore, prayed that appropriate order be passed in this regard.

3.3 So far as the acquittal appeal filed by the State challenging the acquittal of A2 is concerned, Mr. M. J. Buddhbhatti, learned Advocate of accused No.2, submitted that the trial Court has rightly acquitted A2 on the basis of the dying declaration, which was recorded by the Executive Magistrate. He submitted that it is the settled principle of law that in the acquittal appeal, if two views are possible, then also,

the Appellate Court cannot substitute its own view. Therefore, there is no merit in the appeal filed by the State against A2 and the same deserves to be dismissed. He, therefore, urges to dismiss the appeal filed by the State.

4. *Per contra*, Mr. R.C. Kodekar, learned Additional Public Prosecutor of the State, has vehemently submitted that the trial Court has recorded a categorical finding about the guilt of A1 and A3 as the complicity of the accused is established by the prosecution on the basis of the evidence of PW2, Bhavbhai Jivabhai, who is eye witness to the incident, and he has no reason to falsely implicate the accused. He also emphasised that the accused have committed the offence of murder of the deceased on 31st October, 1995 with the intention and in a preplanned manner. Therefore, the trial Court has rightly convicted and sentenced A1 and A3 for the offence under Section 302 of IPC. He submitted that the appeal does not warrant any interference and it deserves to be dismissed. He, therefore, urges to dismiss the appeal filed by A1 and A3.

4.1 So far as the appeal filed by the State against the acquittal of A2 is concerned, according to him, there is voluminous evidence with regard to his catching hold the deceased along with A1 with a view to facilitate A3 to give fatal blow. In this connection, there is no reason to

disbelieve the evidence of PW2 – Bhavbhai Jivabhai Mori. It is also asserted by him that the deceased himself has lodged the complaint wherein also he has stated about the fact that A1 and A2 caught hold him and A3 had given three blows. This complaint is also in the nature of his dying declaration. Therefore, there is no reason to discard this piece of complaint, which is on record at Mark 16/3. According to him, the judgement and order acquitting A2 deserves to be quashed and set aside by allowing the appeal filed by the State and A2 is required to be convicted and sentenced for the offence under Section 302 of IPC. He, therefore, urged to allow this appeal and convict A2 for the offence under Section 302 of IPC and sentence him to the imprisonment for life. He, therefore, urged to pass appropriate order.

5. This Court has considered the submissions advanced by Mr. M. J. Budhhbhatti, learned Advocate of the appellants, and Mr. R.C. Kodekar, learned Additional Public Prosecutor for the State of Gujarat. We have perused the impugned judgment and order, and the set of evidence supplied by him during the course of his submission. We have also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record, which is read and re-read by the learned Advocates of the parties with reference to broad and reasonable probabilities of the case.

6. There is no dispute about the fact that deceased died a homicidal death. To prove this fact, the prosecution has examined and relied upon the oral testimony of PW-10, Dr. Kishorekumar Raghuvirdas Hariyani, Exh.50. He has, *inter alia*, testified that during night hours on 31st October, 1995, he was on duty in the Municipal General Hospital, Veraval. At that time, Gambhirsinh, who was brought to him for treatment, was fully conscious. He has also issued injury certificate, which is on record at Exh.51. During the course of the day, the deceased died and therefore, on the next day, he has performed the *post mortem* on the dead body of the deceased. At the time of performing *post mortem*, he found five external injuries on the dead body of the deceased, which he had noted in the P.M. Report. He also found four internal injuries on the dead body of the deceased. According to him, the cause of death of the deceased was due to shock following massive intro abdominal haemorrhage due to stab injuries on the right side of abdomen. He has also prepared *post mortem* report, which is on record at Exh.53. A conjoint reading of the oral testimony of PW-10 and *post mortem* report would show that the deceased died a homicidal death. The trial Court has rightly held that the deceased died a homicidal death. We, accordingly, confirm the said finding of the trial Court.

7. Now, the next question, which falls for our determination, is that whether the prosecution has established the complicity of the

accused in respect of the charge levelled against them. At this stage, it is required to be noted that there is only one eye witness to the incident and that is, PW-2, Bhavbhai Jivabhai Mori, Exh.26. In order to decide whether the prosecution has established the complicity of the accused in respect of the charge levelled against them, the testimony of PW2 – Bhavbhai Jivabhai Mori is required to have a close look. PW2 has, *inter alia*, deposed that he is a labourer in the farm house of the deceased, Gambhirsinh Keshubhai Makwana; he has narrated the incident. He has deposed that in his presence A1 and A2 caught hold the deceased and A3 gave three knife blows on the right side of the chest. He has also identified the accused in the Court. He has supported the prosecution case fully. He was cross examined at length by the defence. He successfully withstood the test of cross examination. Lot many suggestions were put to him that he had not seen the incident, but, he had repelled all the suggestions successfully. According to us, there is no reason to discard the evidence of PW 2. On reappraisal of the evidence of PW2, this Court finds that the incident had taken place, A1 and A2 caught hold the deceased and A3 gave three knife blows on the chest of the deceased, which has proved to be fatal, and resultantly, during the course of treatment, the deceased died.

8. The prosecution has thereafter examined and relied upon PW3 - Pratapbhai Gigubhai, cousin brother of the deceased, at Exh.27,

He has in the oral testimony testified that he had reached the place of occurrence and seen the deceased in injured condition and A1 and A2 had caught hold the deceased. Initially, this witness has not supported the prosecution case and thereafter, supported the case of the prosecution.

9. The prosecution thereafter has examined and relied upon the oral testimony of PW4 – Khatubhai Arjanbhai Makwana, Exh.33. He has, *inter alia*, stated that the deceased had told him that three accused persons have assailed him. The deceased also told him that A1 and A2 caught hold him and A3 gave knife blows. He has supported the prosecution case.

10. The prosecution, thereafter, examined and relied upon the oral testimony of PW5, Radhuben Rukhadbhai, Exh.34, who was the labourer in the farm house of the deceased; he had seen the accused persons going towards *khala* of Gambhirsinh. He has supported the prosecution case.

11. The prosecution thereafter has relied upon the oral testimony of PW9, Devani Kishorekumar Vitthaldas, Exh.45, Deputy Mamlatdar and Executive Magistrate, who recorded the dying declaration, which is on record at Exh.47. He has, *inter alia*, testified that he had obtained the

certificate from the doctor about the consciousness of the deceased and thereafter, he has recorded the dying declaration. In his oral testimony, he has stated that on 31st October, 1995, he was on duty as Deputy Mamlatdar, Veraval. At about 10:30 p.m., a police mobile had come to his house and he was informed to record the dying declaration. He, therefore, went to the hospital and then, obtained the fitness certificate from the doctor and thereafter, he has recorded the dying declaration of the deceased. The said dying declaration is on record at Exh.47. On conjoint reading of the oral testimony of Devani Kishorekumar Vitthaldas as well as the dying declaration at Exh.47, it is seen that the incident had taken place at 5:30 p.m. on 31st October, 1995. On that day, he loaded the ears of millet in the tractor and then, went to unload the same in his field. There is no place in his field at that time. From the adjoining field, A1 and his two sons A2 and A3 ran to his field and without any conversation, A2 pelted a stone. Therefore, the deceased tried to run away from the place. At that time, A1 caught hold him and A3 inflicted three blows of knife in his chest. He, therefore, shouted for help. At that time, his cousin brother – Pratapsinh came there and relieved him from the accused.

12. On overall appreciation of the evidence on record, according to us, the incident did take place at 5:30 p.m. on 31st October, 1995 in the field of the deceased where all the accused came there and A2 pelted

a stone, whereas A1 caught him hold and A3 inflicted three knife blows, which has proved to be fatal.

13. In view of the aforesaid evidence, the next question which falls for determination of this Court is that what offence has been committed by the accused. The trial Court has convicted A1 and A3 for the offence under Section 302, whereas has acquitted A2 no the basis of the dying declaration. So far as the case of A3 is concerned, he gave three blows, which has proved to be fatal, therefore, according to us, the trial Court has rightly convicted A3 for the offence under Section 302 of IPC.

So far as the case of A1 is concerned, according to us, his case can be separated from the case of A3. As per the prosecution case, A1 and A2 caught hold the deceased, which facilitated A3 to inflict the knife blows to the deceased.

14. In the case of ***Bechara Kora Modi & Ors. vs. State of West Bengal***, reported in ***AIR 2006 SC 638***, there was evidence of sole eye witness that the accused persons surrounded the deceased in a paddy field and one of them gave spade blow on the head of the deceased and thereafter, they ran away; there was also evidence that no witness stating that other accused carried weapons or inflicted any injury; there

was no evidence that the accused had prior meeting of mind. The Supreme Court, in the said set of circumstances, held that the accused inflicting head injury only is liable to conviction and other accused are entitled to the benefit of doubt.

15. Similarly, in the case of ***Manubhai Chimanlal Senma (Senwa) & Ors. Vs. State of Gujarat***, reported in ***(2004) 10 SCC 173***, the Supreme Court held that the Court below has rightly convicted A1, but, conviction of A2 and A3, who caught hold the deceased, cannot be sustained as they did not share the common intention with A1.

16. Applying the principles laid down by the Supreme Court in the above referred to two judgements to the facts of the instant case, since A1 caught hold the deceased and there is no evidence to the effect that the accused and the deceased had previous enmity or A1 was armed with any weapon, according to us, A1 did not share the common intention with A3 to commit murder of the deceased. His case can be separated from the case of A3. At the most, it can be said that he had knowledge that by the act of A3 of giving blow to the deceased, the deceased would die. Therefore, knowledge of causing murder of the deceased would attribute to him. We, therefore, while upholding the conviction recorded against A3 under Section 302, alter the same under Section 304, Part-I of IPC and hold that since he is in jail for last more

than eight years, custodial sentence would meet the ends of justice.

17. Now, this takes us to examine the appeal filed by the State challenging the acquittal of A2. The trial Court has relied upon the oral testimony of PW9, Devani Kishorekumar Vithhaldas (Exh.45), who has recorded the dying declaration of the deceased, wherein the deceased has categorically stated that A2 had pelted the stone and he has nowhere stated that A2 also caught hold him. Therefore, according to us, the trial Court has rightly acquitted A2 by giving benefit of doubt.

18. At this juncture, we would like to refer to the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial Court and which have been very succinctly explained by the Supreme Court in the matter of ***AJIT SAVANT MAJAGAVI VS. STATE OF KARNATAKA,*** reported in ***AIR 1997 SC 3255***. The same reads as under:

(a) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

(b) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(c) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds not subscribing to the view expressed by the trial Court that the accused is entitled to acquittal.

(d) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial Court.

(e) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(f) The High Court has also to keep in mind that the trial Court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court, especially in the witness box.

(g) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

19. In ***ANOKH SINGH vs. STATE OF PUNJAB***, reported in ***AIR 1992 SC 598***, the Supreme Court has held that in an appeal against acquittal, the High Court should attach greater weight to appreciation of evidence by the trial Judge who had the occasion to watch the

demeanour of the witnesses.

20. It is a cardinal principle of criminal jurisprudence that in an acquittal appeal if other view is possible then also appellate Court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the trial Court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable. (See Ramesh Babulal Doshi V. State of Gujarat (1996) 9 SCC 225). In the instant case, the learned APP has not been able to point out to us as to how the findings recorded by the learned trial Judge are perverse, contrary to material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

21. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned trial Judge for acquitting the accused. Suffice it to say that the learned trial Judge has given cogent and convincing reasons for acquitting the accused and the learned A.P.P. has failed to dislodge the reasons given by the learned trial Judge and convince this Court to take a view contrary to the one taken by the learned trial Judge.

In the instant case, the trial Court on the basis of the dying

declaration has recorded categorical finding giving benefit of doubt to A2. We, therefore, do not incline to interfere with the said finding of acquittal recorded *qua* A2.

22. Seen in the above context, Criminal Appeal No.1037 of 1999 filed by A1 and A3 deserves to be partly allowed *qua* A1 by altering the conviction of A1 from Section 302 to Section 304, Part-I of IPC and deserves to be dismissed *qua* A3 confirming and maintaining the conviction of A3, whereas Criminal Appeal No.1092 of 1999 filed by the State challenging the acquittal of A2 deserves to be dismissed.

23. For the foregoing reasons, Criminal Appeal No. 1037 of 1999 filed by A1 and A3 fails *qua* A3 and accordingly, it is dismissed and the conviction and sentence recorded against him for commission of the offence under Section 302 of IPC is hereby confirmed and maintained, whereas it succeeds in part *qua* A1 and accordingly, it is partly allowed. Resultantly, the conviction and sentence recorded against A1 for commission of the offence under Section 302 of IPC is altered to the offence under Section 304, Part-I of IPC and since he is in jail for more than 8 years, custodial sentence served would meet the ends of justice.

Criminal Appeal No. 1092 of 1999 filed by the State

challenging the acquittal of A2 is hereby dismissed.

A1 is in jail for more than 8 years, therefore, the Jail authority is directed to release A1 – Bhavsinghbhai Hamsinghbhai Makwana forthwith from the jail if he is not required in connection with any other case.

It is reported by Mr. R.C. Kodekar, learned Additional Public Prosecutor, that A3 was released on regular bail during the pendency and hearing of the appeal *vide* order dated 19th January, 2004 rendered in Criminal Miscellaneous Application No.296 of 2004 and since the conviction recorded against him under Section 302 of IPC is confirmed and maintained, necessary order be passed for securing his presence.

Since A3 is on long term bail, he is directed to surrender to the Jail Authority within a period of one month hereof to serve out the remaining period of sentence, failing which the learned Sessions Judge, Amreli is directed to issue Non-Bailable Warrant to procure his presence and send him to jail to serve out the remaining period of sentence.

Both the appeals are disposed of accordingly.

Muddamal be disposed of as per the direction contained in

the impugned judgement and order.

[A. M. Kapadia, J.]

[R. H. Shukla, J.]

*kamlesh**